In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-931

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, ET AL.,
Defendant-Appellants,

AND

ARIZONA FARM BUREAU FEDERATION,
AN ARIZONA CORPORATION, ET AL.,
Intervenor Appellants,

versus

UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Arizona

MOTION TO AFFIRM

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Pursuant to Rule 16 of the Rules of the Supreme Court, Appellees move that the final judgment of the three-judge District Court awarding attorneys' fees to Appellees be affirmed for the reasons that the questions raised in the Jurisdictional Statement are so unsubstantial as not to need further argument and that the decision below is so plainly correct as not to warrant further review by this Court.

OPINION BELOW

The opinion and judgment of the District Court (September 12, 1978) awarded attorneys' fees to Appellees pursuant to 42 U.S.C. § 1988. They are reproduced in the Appendix to the Jurisdictional Statement, pp. A-1 through B-2.

QUESTIONS PRESENTED

(1) Did the District Court properly exercise its discretion under 42 U.S.C. § 1988 when it awarded attorneys' fees to Appellees who prevailed in a 42 U.S.C. § 1983 action against state officials who had both defended and enforced an unconstitutional statute against the Appellees for over five years?

(2) Did the Court properly award attorneys' fees under 42 U.S.C. § 1988 against parties who had intervened as full parties in a proper 42 U.S.C. § 1983 action, were responsible for most of the Appellees' litigation costs and did not prevail in the lawsuit?

ARGUMENT

The State of Arizona and intervening growers' associations propose such a narrow and distorted reading of the Civil Rights Attorneys' Fees Awards Act of 1976[1] that it should be summarily rejected. Their proposed application of this Act entirely ignores not only the express language of the statute but also its clear legislative history.[2] The appellants attempt to turn both on their heads.

[1] 42 U.S.C. 1988 as amended Pub. L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641.

[2] Senate Report No. 94-1011, 1976 U.S. Code Cong. and Adm. News, p. 5908 et seq.

Never do the State and growers argue that it was improper for the District Court to award the Plaintiff-Appellees attorneys' fees under 42 U.S.C. § 1988. Rather they claim it was improper to assess those fees against *them*, the only parties against whom the fees could be assessed. In effect they are proposing that Congress through the Civil Rights Attorneys' Fees Awards Act may have created a remedy, but it is a remedy that the Courts cannot enforce. It takes little examination to determine that their position is both unsubstantial and unsupportable.

A. The Attorneys' Fees Award Against State Officials Is Clearly Proper.

The 1976 Amendment to 42 U.S.C. § 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys fee as part of the costs.

There can be no question that this Amendment applies to the present case and that it empowers the District Court to enter an attorneys' fee award against the various defendant state officials.

This action was originally filed and has been prosecuted throughout under 42 U.S.C. § 1983, alleging that the Arizona Agricultural Employment Relations Act (AERA) A.R.S. § 23-1381 et seq., both on its face and in its application violated numerous rights guaranteed under the First and Fourteenth Amendments. Named as defendants were the respective state officials who were responsible for enforce-

ment of the AERA and whose offices had in fact enforced the Act over a five year period. Among those officials named are the Governor of Arizona who appoints the members of the Agricultural Employment Relations Board and the General Counsel of that Board, the Attorney General of Arizona to whom the Board's General Counsel who prosecutes the Act is responsible, and the members of the Board who are ultimately responsible for all administrative enforcement and decisions under the AERA.

On April 20, 1978, after five years of litigation—and a corresponding five years of enforcement of the AERA against the Appellees by the Board, its General Counsel and private parties[3]—a three-judge panel granted in its entirety the relief sought by the Appellees when it ruled that the AERA was unconstitutional and enjoined its enforcement. Appellees' subsequent motion for attorneys' fees was granted in part, from which this appeal is taken.

In response to the obvious propriety of the District Court's award the state officials offer only two feeble arguments. They first suggest that the award was improper because the action was filed before the Attorneys' Fees Award Act was passed. Secondly they argue that they did not "act" other than to carry out the duties of their respective offices to enforce the AERA.

In response to the first contention it is clear that Congress intended the Attorneys Fee Award Act to apply not only to cases filed after October, 1976 but also to cases pending at that time. This question has been squarely addressed by the Courts of Appeals in at least four circuits and each time has been decided against the position now taken by the State and intervenors. *Gore v. Turner*, 563 F. 2d 159 (5th Cir. 1977); *Finney v. Hutto*, 548 F. 2d 740 (8th Cir. 1977); *Bond v. Stanton*, 555 F. 2d 172 (7th Cir. 1977); *Stanford Daily v. Zurcher*, 550 F. 2d 464 (9th Cir. 1977), rev'd on other grounds ..... U.S. ....., 98 S. Ct. 1970 (1978). As the Ninth Circuit Court of Appeals held when deciding whether the 1976 Amendment applied to a case filed before its adoption:

> We are not left to speculate whether Congress intended the Act to apply to attorney's fee awards in cases like this one. The Act expressly states that it is applicable to § 1983 actions like the present one (footnote omitted). And the legislative history is crystalline on the point. The House Report accompanying the House version of the same bill states:
>
> > 'In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. Bradley v. Richmond School Board, 416 U.S. 696, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1974).' (H.R. Rep. No. 94-1558, 94th Cong. 2d Sess. 4, n.6 (1976).) (*Stanford Daily, supra,* 550 F. 2d at 466).

The State's second contention is equally without merit, i.e. that because this action was primarily an attack on the invalidity of a statute, those officials who merely acted to defend or enforce that statute should not be held liable for attorneys' fees. By advancing this argument the Appellants totally misconstrue the Civil Rights Attorneys Fees Awards Act as a punitive measure whereas its purpose is

[3]See Enforcement Stipulation; A. 79-191, filed in appeal of main case, No. 78-225.

compensatory. Its objective is not to punish persons who may have violated civil rights laws—other remedies serve that end—but rather to encourage persons to enforce those laws by mitigating the expense of litigation.[4] This Court has recognized this distinction in relation to similar attorneys' fees statutes and has made clear that it is the costs to the plaintiffs and not the good or bad faith of the defendants that was Congress' concern in passing such laws. See, *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402.

It is beyond dispute that civil rights can be just as effectively denied through passage and enforcement of oppressive and discriminatory statutes as by the grossest misconduct of governmental officials. As shown here, litigation to enjoin enforcement of such statutes can be just as lengthy and expensive as litigation to enjoin conduct. There is absolutely nothing in either 42 U.S.C. § 1988 itself or its legislative history that even suggests support for the State's claim that the prevailing party be compensated for attorneys' costs in one situation but not the other.

The fact is that the federal Courts have often awarded attorneys' fees against state officials after successful challenges to statutes which they were called on to enforce. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) attorneys' fees awared under 1972 Amendments to Title VII of the Civil Rights Act of 1964 against state officials whose duty it was to enforce a statute found in violation of the Equal Protection Clause; *Brandenburger v. Thompson*, 494 F. 2d 885

[4]1976 U.S. Code Cong. and Adm. News, pp. 5910-12.

(9th Cir. 1974) fees awarded against Director of Social Services after successful challenge to welfare residency requirement; *White v. Crowell*, 434 F. Supp. 1119 (W.D. Tenn. 1977) attorneys fees granted against state officials after challenge to reapportionment plan.

In light of the above it is obvious that the State defendants have presented no argument why they are immune from an attorneys' fees award under 42 U.S.C. § 1988 that is substantial enough to warrant review by this Court.

B. The Court's Award Against the Intervening Growers Is Also Proper.

"In any action . . . to enforce a provision of section 1983 . . . the court may in its discretion . . . allow the prevailing party . . . a reasonable attorneys fee as part of the costs." 42 U.S.C. § 1988. In neither this provision nor its accompanying legislative history is there any limitation whatsoever as to which non-prevailing parties such reasonable fees can be assessed against.

There is no dispute that this was an action to enforce 42 U.S.C. § 1983 and that the appellees prevailed. Therefore the District Court under 42 U.S.C. § 1988 may in its discretion properly assess attorneys' fees against any and all non-prevailing parties who are proper parties to the litigation.

At the outset of this litigation the various grower associations voluntarily moved to intervene as parties on the side of the defendants. As they admit, they did so to protect their own economic interest in the continued enforce-

ment of the AERA.[5] They further admit that they took up the "laboring oar" in defense of the AERA, while testimony at the hearing on the issue of attorneys' fees confirmed that it was the vigorous defense advanced by the intervenors that necessitated most of the legal work of the Appellees.

As the District Court found it is well settled that an intervenor in a civil action is treated as if he were an original party and has equal standing with all other parties. *Galbreath v. Metropolitan Trust Co. of California,* 134 F. 2d 569, 560 (10th Cir. 1943); cf. *Ross v. Bernard,* 396 U.S. 531, 542, n.15; 7A Wright and Miller, *Federal Practice and Procedure* § 1920, p. 611. Once they became parties to this action the intervening growers also became subject to all rules regarding assessment of costs and attorneys' fees that applied to all other parties, including § 1988.

Surely the intervenors could not argue, and indeed have not, that they could not be assessed proper costs of the litigation such as filing fees, trial transcripts, deposition costs, etc. Section 42 U.S.C. 1988 expressly designates reasonable attorneys' fees "as part of the costs". There is no reason to treat these costs differently from any others for which the intervenors, as parties, are liable.

Their argument that they were not acting "under color of law" is irrelevant. They made themselves party to a proper § 1983 action which alleged state action by state officials. Ultimately they became non-prevailing parties in that action and as such are liable like all other non-prevailing parties for the assessment of costs.

[5]Jurisdictional Statement, at p. 14.

CONCLUSION

Since the State and growers have failed to advance any substantial reasons why the District Court's award of attorneys' fees should be set aside, Appellees respectfully submit that the judgment awarding those fees should be summarily affirmed. However since the judgment on the merits of the AERA has also been appealed in case No. 78-225 Appellees realize that the attorneys' fees award cannot be so affirmed until this Court makes a final determination that the Appellees are the "prevailing party." For this reason Appellees join in the suggestion of the Appellants that the Court hold this appeal pending the decision in No. 78-225.

Respectfully submitted,

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